Filed 6/27/19 Hughes v. County of Humboldt CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

LAURENCE S. HUGHES, Plaintiff and Appellant, v. COUNTY OF HUMBOLDT, Defendant and Appellant.	A148940 (Humboldt County Super. Ct. No. DR101000) ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]
LAURENCE S. HUGHES, Plaintiff and Respondent, v. COUNTY OF HUMBOLDT, Defendant and Appellant.	A150526 (Humboldt County Super. Ct. No. DR101000) ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]

BY THE COURT:

It is ordered that the opinion filed herein on May 28, 2019, be modified as follows:

On page 3, in the last sentence of the first full paragraph, the phrase "—in this case, the Director of the DHHS, who was a man" should be deleted, so that the sentence reads:

> They only provided a recommendation which "went up the chain of command" to the "appointing authority."

There is no change in the judgment.

Hughes's petition for rehearing is denied.

(Streeter, Acting P.J., Tucher, J., and Brown, J. participated in the decision.)

Dated: _____ _____, P.J.

A148940, A150526

Filed 5/28/19 Hughes v. County of Humboldt CA1/4 (unmodified opinion)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

LAURENCE S. HUGHES, Plaintiff and Appellant, v. COUNTY OF HUMBOLDT, Defendant and Appellant.	A148940 (Humboldt County Super. Ct. No. DR101000)
LAURENCE S. HUGHES, Plaintiff and Respondent, v. COUNTY OF HUMBOLDT, Defendant and Appellant.	A150526 (Humboldt County Super. Ct. No. DR101000)

Laurence S. Hughes, who was then employed as an Employment Training Program Coordinator in the Social Services Branch of Humboldt County's Department of Health and Human Services, applied for a promotion to a position as Employment and Training Manager, but a woman was promoted instead of him. He filed an action under the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.) alleging sex discrimination (Gov. Code, § 12940, subd. (a)), age discrimination (*ibid.*), retaliation (*id.*, subd. (h)), and requesting reinstatement (Gov. Code, § 12965, subd. (c)). He initially pursued only a disparate treatment theory, but after the County prevailed on a motion for summary adjudication of the sex discrimination cause of action under that theory, Hughes amended the complaint several times, eventually alleging both a disparate treatment and a

disparate impact theory of sex discrimination.[1] The County unsuccessfully moved for summary adjudication of the disparate impact theory.

The case went to jury trial on the disparate impact theory and retaliation cause of action, and the jury found in favor of Hughes on the gender discrimination claim but rejected the retaliation claim. It awarded Hughes $185,000 in damages, and the judge later awarded him attorney fees of $308,582. (See Gov. Code, § 12965, subd. (b).) The County appeals both the judgment and the attorney fees award, contending among other things that its motion for judgment notwithstanding the verdict should have been granted because Hughes's statistical evidence of disparate impact was flawed in that it focused solely on promotions within the SSB rather than on countywide hiring and promotion statistics. The County also contests the attorney fees award both because Hughes should not have been the prevailing party and because the amount awarded was allegedly excessive. Hughes filed a cross-appeal alleging the trial court erroneously granted summary adjudication of the disparate treatment claim.

We conclude Hughes failed as a matter of law to establish a prima facie case of sex discrimination. Therefore, we reverse the judgment and remand with an order to enter a new judgment in favor of the County.

I. FACTUAL AND PROCEDURAL BACKGROUND

Hughes is a high school dropout who later earned his GED and a bachelor's degree, and at age 32 got a job with the County of Humboldt (County) as a vocational counselor in the Employment Training Department, which is now a division within the Social Services Branch (SSB) of the Department of Health and Human Services (DHHS). Within that division he moved up in rank over the course of 26 years, receiving eight progressively more responsible promotions, continuing his education all the while, until by 2009 he was a Program Coordinator in the Employment Training Division of the SSB. By that time, Hughes had earned a bachelor's degree in business management with an

[1] The age discrimination claim was also resolved against Hughes on summary adjudication.

emphasis in personnel and two master's degrees, one in psychology with an emphasis in marriage and family therapy and the other in general psychology. He also had completed all course work for a Ph.D., but he did not finish his dissertation. In his work with the County, Hughes consistently received "above average" or "outstanding[]" performance evaluations.

In late 2009, Hughes applied for the position of Employment Training Manager (ETM), which Hughes characterized as the "next step in the career ladder I was on." The job description for this position indicated that a four-year college degree in fields including "business, public administration, psychology, social services, or a closely related field," and four years of professional-level experience in job development, employment training or similar social service delivery programs were "desirable" assets (there were no mandatory qualifications). The initial review of applications for that position was made by the County's Human Resources department, which narrowed down the field of 52 applicants to five individuals—three men (including Hughes) and two women—determined to be eligible for consideration. Three of these candidates—Hughes, Consuelo "Connie" Lorenzo and Bruce Alexander—worked for the County already, while two others—Tim Hoon and Sherry Williams—were outsiders. Three women, Marti Hufft (the supervisor for the position), Donna Wheeler (Hufft's supervisor), and Jaqueline Debets (a manager in economic development), interviewed the candidates. The three managers sitting on Hughes's interview panel did not have discretion to promote anyone. They only provided a recommendation which "went up the chain of command" to the "appointing authority"—in this case, the Director of the DHHS, who was a man.

Hughes believed his interview went extremely well, but the County hired Lorenzo instead. When Hufft informed Hughes in February 2010 that he would not be receiving the promotion to ETM, she encouraged him to apply for another position, as Employment Training Worker Supervisor in another unit of the SSB (the CalWORKS unit). Hughes successfully applied and moved to that position in August 2010, receiving a small bump in salary.

Before he left his position as Program Coordinator, Hughes was pulled aside by Lorenzo, and she asked him about a rumor that he might be planning to file a complaint with EEOC. Hughes alleges Lorenzo told him he "better not" file a discrimination complaint with the EEOC if he ever wanted another promotion. After having what (to him) was an uncomfortable interaction with Lorenzo at his new place of work a few days after he started there, Hughes consulted his physician, who placed him on temporary disability leave. After a few months of disability leave, Hughes retired permanently from the County.

In November 2010, Hughes filed a complaint alleging gender and age discrimination based on disparate treatment, as well as retaliation. The County moved for summary judgment, and in May 2012 (before there had been a ruling), Hughes filed a first amended complaint alleging disparate treatment and disparate impact, as well as age discrimination and a renewed claim for retaliation. In June 2012, the court granted summary adjudication on age discrimination and disparate treatment based on gender in the first cause of action but denied the motion as to retaliation. The court allowed the disparate impact claim to proceed.

In a second amended complaint filed in September 2012, Hughes re-alleged his cause of action for age and sex discrimination based on disparate treatment and disparate impact theories and for retaliation. After the County successfully demurred to the second amended complaint and to a third amended complaint, Hughes filed his "Amendment to Third Amended Complaint." The County moved for summary adjudication on the disparate impact theory once again, but the court denied the motion.

The case proceeded to a jury trial on the disparate impact and retaliation claims in March 2016, with the jury returning a verdict on May 2, 2016. The jury found the County's challenged employment selection policy—"the oral interview process after the receipt of an eligible candidate list under Merit System Rule IV"—had a "disproportionate adverse effect on males."

The jury found this policy accomplished a necessary business purpose, but there was an alternative selection policy that would have accomplished the business purpose

equally well with less impact on males. Having found that the identified selection policy was a substantial factor in causing harm to Hughes, the jury found his damages for past economic loss were $60,000 and past noneconomic loss were $125,000. Hughes subsequently moved for attorney fees and costs, which were granted in the amount of $257,152 with a multiplier of 1.2, for a total award of $308,582. The County timely appealed from the judgment, while Hughes cross-appealed (No. A148940). The County later filed a notice of appeal from the order granting attorney fees (No. A150526). The two appeals were consolidated in this court.

II. DISCUSSION

After the verdict was returned, the County filed motions for judgment notwithstanding the verdict and for a new trial, both of which were denied. The County appeals on the basis that the motion for judgment notwithstanding the verdict should have been granted, or alternatively, that the case should be remanded for further proceedings. The County raises five issues on appeal: (1) judgment notwithstanding the verdict should have been granted as a matter of law because Hughes presented no evidence that Merit System Rule IV had an adverse impact on the total countywide group to which it was applied; (2) the judgment notwithstanding the verdict should have been granted because Hughes presented no evidence of a viable alternative to the oral interview process—let alone evidence that such an alternative would have a "less adverse impact on males"; (3) Hughes tried a disparate treatment case in the guise of a disparate impact case; (4) the trial court erred in failing to grant the County's motion in limine to exclude disparate treatment evidence; and (5) the attorney fees award should be vacated because the County should have been the prevailing party, and because the trial court allowed hours of compensation that should not have been allowed.

As we shall explain, because we agree with the County's first point outlined above, we conclude the judgment must be reversed and judgment must be entered for the County. Consequently, we will also vacate the attorney fees award in No. A150526.

A. The County's Motion for Judgment Notwithstanding the Verdict

An " 'appeal from the trial court's denial of [a] . . . motion for judgment notwithstanding the verdict is a challenge to the sufficiency of the evidence to support the jury's verdict and the trial court's decision.' " (*Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1320 (*Carter*).) "On appeal from the denial of a motion for judgment notwithstanding the verdict, we determine whether there is any substantial evidence, contradicted or uncontradicted, supporting the jury's verdict." (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1138.) Where, however, the trial court's denial of judgment notwithstanding the verdict is based on an issue of law, our review is de novo. (*Ibid*.)

" 'Disparate treatment' is *intentional* discrimination against one or more persons on prohibited grounds. [Citations.] Prohibited discrimination may also be found on a theory of 'disparate impact,' i.e., that regardless of motive, a *facially neutral* employer practice or policy, bearing no manifest relationship to job requirements, *in fact* had a disproportionate adverse effect on members of the protected class." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354, fn. 20; accord *Carter*, *supra*, 122 Cal.App.4th at p. 1321; see *Frank v. County of Los Angeles* (2007) 149 Cal.App.4th 805, 817.) The disparate impact is usually proved through statistical evidence. (See *Watson v. Fort Worth Bank and Trust* (1988) 487 U.S. 977, 992 [referring to "the inevitable focus on statistics in disparate impact cases"]; *Stout v. Potter* (9th Cir. 2002) 276 F.3d 1118, 1122; *Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1404–1405.)

In *Wards Cove Packing Co. Inc. v. Atonio* (1989) 490 U.S. 642, superseded by statute on other grounds, 42 U.S.C. § 2000e-2(k), the Supreme Court established a three-step, shifting burdens framework for proof of disparate impact in Title VII cases that has also been adopted in California for use in FEHA claims. (See *Carter*, *supra*, 122 Cal.App.4th at pp. 1323–1324; *City and County of San Francisco v. Fair Employment & Housing Com.* (1987) 191 Cal.App.3d 976, 989–990). First, a plaintiff must establish a prima facie case that the defendant's challenged policy or practice has a "significantly disparate impact on nonwhites" or another protected group. (*Wards Cove*, at p. 658;

Jumaane v. City of Los Angeles, *supra*, 241 Cal.App.4th at p. 1405 [disparate impact must be " ' "functionally equivalent to intentional discrimination" ' "].) If a plaintiff makes out a prima facie case, the burden shifts to the defendant to show "any business justification [defendants] offer for their use of these practices." (*Wards Cove*, at p. 658.) "This phase of the disparate-impact case contains two components: first, a consideration of the justifications [a defendant] offers for his use of these practices; and second, the availability of alternative practices to achieve the same . . . ends, with less [discriminatory] impact." (*Ibid.*; see *City and County of San Francisco*, at pp. 989–990; *Hardie v. NCAA* (9th Cir. 2017) 876 F.3d 312, 319–320 [Title II].)

In this case, the identified policy allegedly creating the disparate impact was "the oral interview process after the receipt of an eligible candidate list under Merit System Rule IV. . . ."[2] We see two problems with Hughes's disparate impact showing, both of which are fatal as a matter of law. First, we look to *Smith v. City of Jackson* (2005) 544 U.S. 228, 241 (*Smith*), which involved a pay plan that was alleged to be neutral on its face but in application discriminatory by age. Citing *Wards Cove*, the High Court there held that the plaintiffs failed to make out a prima facie case because they did not "*identify the specific practice being challenged [as] the sort of omission that could 'result in employers being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances . . . .*' " (*Smith*, at p. 241, quoting *Wards Cove*, *supra*, 490 U.S. at p. 657, italics added.) "As we held in *Wards Cove*," the Court explained, "it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is 'responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.' " (*Smith*, at p. 241, quoting *Wards Cove*, at p.

[2] The pertinent portion of Merit System Rule IV states: "The appointing power shall interview and make a selection from among the certified eligible candidates and shall notify the person or persons of their appointment."

656; see also *Watson*, 487 U.S. at pp. 995–996 ["statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group"].) Absent such a particularized showing, we cannot assume that observed disparities within a statistical population are a reliable indicator of discriminatory impact.

Because the jury verdict jury for Hughes rests on an adverse impact theory, under *Smith* he had the burden of "isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities." (*Smith, supra*, 544 U.S. at p. 241.) The only evidence we see in the record concerning the employment practice the jury was asked to pass upon—the oral interview process as set forth in Merit System Rule IV—was testimony about the single oral interview for the Employment Training Manager Position, which resulted in the selection of Connie Lorenzo. That testimony came from the three panel members who recommended Lorenzo for the position. While such a showing might have sufficed to establish prima facie comparative adverse treatment under a disparate treatment theory (discriminatory intent is another matter), it was not enough to support a prima facie case of disparate impact. *Smith* teaches that Hughes had to isolate and identify exactly why the practice of conducting oral interviews was discriminatory in impact and to establish that all of the other interviews in his sample had the same flaw.[3] He failed to do so. Were all of the

[3] See, e.g., *Davis v. Cintas Corp.* (6th Cir. 2013) 717 F.3d 476, 497 ("[Plaintiff] Davis did not identify a 'particular employment practice' within the meaning of Title VII by pointing to *all* of the subjective elements in the Meticulous Hiring System. . . . [N]ot all of the system's subjective elements are the same. Each different interview, for instance, has a specific interview guide, and different managers conduct interviews at different stages of the process. [¶] . . . Davis might urge, if the statistical data indicate that those managers have gender biases, their exercising discretion at different steps of the Meticulous Hiring Process should not insulate [Defendant employer] from disparate-impact liability. [¶] . . . [B]ut the simple fact remains: Davis did not isolate the specific practices that caused the disparate impact she alleges; nor did she show that the managers' various exercises of discretion in the Meticulous Hiring System were incapable of separation for analysis. Davis's disparate impact claims for both 2003 and

interview panels following a script that was biased against men? Was there a set of weighting criteria guiding the decision process that was biased against men? There was no evidence at all concerning these matters. Rather, what we have is a record that appears to have been designed for a discriminatory treatment case that is now said to be adequate for a disparate impact case as well. The law demands more.

Second, we agree with the County that, to support a prima facie case of disparate impact based solely on the practice of conducting oral interviews as required by Merit System Rule IV, the relevant statistical analysis had to be conducted on the basis of countywide hiring practices because the challenged policy—on its face—applies countywide to every department, and to all full-time employees (except for those department heads who are either elected or appointed by the Board of Supervisors). The County employs approximately 1,800 full-time regular employees and has 12 departments, including the DHHS. The DHHS employs about 868 people, and the SSB is a branch of DHHS employing about 450 people. The County's DHHS is comprised of about 76% women, which is consistent with the male-to-female ratio of the social worker workforce in California. Yet, the County argues, Hughes was allowed to "cherry-pick" evidence of 11 promotions and/or hires into middle management positions by artificially narrowing his focus to SSB, where all these jobs went to women. The County argues "[i]t is a matter of common sense and basic logic" that "in any large population a subset can be chosen that will make it appear as though the complained of practice produced a disparate impact." (*Darensburg v. Metropolitan Transp. Com'n* (9th Cir. 2011) 636 F.3d 511, 520.) "[T]he correct inquiry is whether the policy in question had a disproportionate impact on the [the protected class members] in the total group to which the policy was applied." (*Greater New Orleans Fair Housing Action Center v. U.S. Dept. of Housing & Urban Development* (D.C. Cir 2011) 639 F.3d 1078, 1085.)

2004, therefore, fail.").

Hughes presented testimony by an expert in statistics from Humboldt State University, Dr. Mark Rizzardi, explaining that he looked at all the hiring "pools" (i.e., the groups of qualified candidates chosen for interviews) in the SSB from 2007 onward[4] in which at least one male was a candidate. Hughes himself had culled the documents from those produced in discovery, and he included data for only middle management positions in the SSB. Dr. Rizzardi excluded two pools in which there were no male candidates, as he could not use those for showing the probability of a male candidate being chosen. In the eight pools Dr. Rizzardi examined, from which 11 hires were made, there were 60 eligible candidates, 10 of whom were male and 50 of whom were female. Of those 11 hires, all were female. Dr. Rizzardi testified the probability—or "p value"—of that distribution of male-to-female hires in a gender-blind selection process was approximately five percent.

On cross examination, Dr. Rizzardi admitted he was provided no hiring data concerning the selection of a few men to management positions in DHHS—Michael Goldsby, Doug Rose-Noble, and Mark Sussman. Goldsby was hired as a DHHS Program Manager in 2006, and was then promoted to Senior Program Manager in 2008. Rose-Noble was promoted to DHHS Program Manager in 2009. Sussman was selected as Program Manager in 2011. These hiring or promotion decisions were made in other branches of DHHS (the Mental Health and Public Health branches), but they were made using the same interview procedures that Hughes claims resulted in a disparate impact on men. Dr. Rizzardi also admitted he was given no selection data concerning (1) any branch directors within the SSB, (2) any branch directors in the Public Health branch of the DHHS, (3) management positions in any of the other seven branches of the DHHS, (4) any management positions of any other County Departments, including the Human Resources Department, Sheriff's Department, or Public Works Department, though Dr.

[4] The County did not keep records sufficient to determine who had been in the pools for employees hired before 2007.

Rizzardi acknowledged "the [selection] procedure is the same" in those departments as that used in the DHHS.

Hughes stands by his expert's testimony on five percent probability as substantial evidence supporting the verdict. He relies on the so-called "80 percent rule" adopted by the Equal Employment Opportunity Commission (EEOC), which instructs "that '[a] selection rate for any [protected group] which is less than four-fifths . . . of the rate for the group with the highest rate,' " may " 'generally [be] . . . regarded . . . as evidence of adverse impact.' " (*Howe vs. City of Akron* (6th Cir. 2013) 723 F.3d 651, 659–660, quoting 29 C.F.R. § 1607.4(D).) The County presented competing expert testimony by Dr. Daniel Kuang, whose qualifications include a Ph.D. in both Industrial Organizational Psychology and Quantitative Psychology.[5] He opined that Dr. Rizzardi's probability or "p value" of five percent was incorrect because he used an "aggregation method" for the 11 hiring events, which is not an accepted statistical analysis for determining adverse impact. As a result, Dr. Rizzardi's findings were, Dr. Kuang said, incorrect. Even using Dr. Rizzardi's methodology the correct "p value" would be .0511, which is not significant. He also testified that Dr. Rizzardi's calculated threshold of significance was incorrect.

Dr. Kuang further testified that by adding into the group of 11 promoted females the three males named above who had been promoted within DHHS, the statistics would not only show no discriminatory impact on males but would actually show a slight adverse impact on females. And finally, Dr. Kuang testified that the correct statistical analysis would focus not just on the candidates promoted within the SSB, or even within DHHS, but on countywide statistics. This was consistent with the County's argument to the jury that the correct question to be answered was whether Hughes had shown a

[5] Dr. Kuang has been performing adverse impact analysis since the 1990's. At the time of trial he was employed by a consulting firm specializing in affirmative action planning, selection testing, validation, and adverse impact litigation. He also had given presentations to the EEOC and other groups on the topic of compliance with anti-discrimination laws with respect to hiring, selection, termination and compensation.

disparate impact from the challenged personal interview policy across the entire population covered by the policy.

We think this case is similar to *Carter*, *supra*, 122 Cal.App.4th 1313, where a company's restructuring resulted in the elimination of "administrative managers" and a reduction in pay for most of the 56 women and one man who held that title if they stayed on with the company in another capacity. (*Id*. at pp. 1318–1320.) Because most employees in that job classification were women and, for historical reasons, about half were over 40 years old, Carter, who left her job as an administrative manager after the reorganization, sued alleging sex and age discrimination. (*Id*. at pp. 1317, 1320–1321.) The jury found in favor of Carter, awarding her over $1 million in compensatory and punitive damages. (*Id*. at p. 1317.) The Court of Appeal reversed, holding the trial judge should have granted the employer's motion for judgment notwithstanding the verdict because the plaintiff put on evidence only with respect to the impact of the restructuring on administrative managers, not establishing the impact on women over 40 within the company as a whole. (*Carter*, *supra*, 122 Cal.App.4th at pp. 1322–1326; see also *E.E.O.C. v. Freeman* (4th Cir. 2015) 778 F.3d 463, 469–470 (conc. opn. of Agee, J.) [affirming summary judgment for employer in disparate impact case because plaintiff's expert " 'cherry-picked' " only favorable data and ignored hiring decisions at several other store locations, which the trial court had called " 'an egregious example of scientific dishonesty' "]; *Waldon v. Cincinnati Public Schools* (S.D. Ohio 2015) 89 F.Supp.3d 944, 948–949 [statewide law requiring background checks for public school employees required proof of disparate impact throughout the state's schools, not simply in Cincinnati public schools].)

Hughes dismisses the County's position that countywide impacts are the relevant data set as "absurd" and calls it a "bottom line" defense—which Hughes characterizes as an argument that, as long as the employer's overall workforce reflects a gender balance, the employer cannot be liable for sex discrimination in any particular hiring decision. He quotes the United States Supreme Court's rejection of a similar argument: "The suggestion that disparate impact should be measured only at the bottom line ignores the

fact that Title VII guarantees [individuals in a protected class] the *opportunity* to compete equally with [workers outside the protected class] on the basis of job-related criteria." (*Connecticut v. Teal* (1982) 457 U.S. 440, 451 (*Teal*).) Thus, Hughes says, an employer cannot "justify discrimination against [a protected class] on the basis of [its] favorable treatment of other members of [that protected class]. Under Title VII, 'a racially balanced work force cannot immunize an employer from liability for specific acts of discrimination.' " (*Id*. at p. 454.)

But Hughes misconstrues and overextends *Teal*. In *Teal*, four African American applicants for a promotion challenged a pass-fail examination used as part of a two-tier selection process for state employees to be promoted to supervisory positions. Because plaintiffs failed the examination, the State excluded them from further consideration for permanent supervisory positions. (*Teal, supra*, 457 U.S. at pp. 442–444.) Although the examination was racially discriminatory because it excluded a disproportionate number of African American candidates, the State attempted to compensate for the effects of this discrimination by affirmatively promoting a higher proportion of eligible African Americans than whites in order to reach a nondiscriminatory " 'bottom-line result.' " (*Id.* at p. 444.) The Supreme Court held the examination had a disparate impact based on race, an impact that could not be cured by the State's extension of favorable treatment to others in plaintiffs' group at the next step of the hiring process. (*Id*. at pp. 452–456.)

Thus, *Teal* stands for the proposition that an employment policy or practice must be analyzed at the first step in the employment process that produces an adverse impact on a protected group, not at the end result of the employment process as a whole. (*Massarsky v. General Motors Corp.* (3d Cir. 1983) 706 F.2d 111, 121–122; see *Sengupta v. Morrison-Knudsen Co.* (9th Cir. 1986) 804 F.2d 1072, 1076–1077 (*Sengupta*).) *Teal*'s own bottom line is that an employer must not be allowed to manipulate employment statistics to defeat a plaintiff's prima facie showing of disparate impact. (See *Newark Branch, N.A.A.C.P. v. City of Bayonne, N.J.* (3d Cir. 1998) 134 F.3d 113, 123–125.) By the same token, a plaintiff's attempt to manipulate statistics to create a misleading impression of disparate impact must be rebuffed.

We agree with the County that *Teal* is not controlling here because Hughes does not challenge a preliminary disqualifying policy in a multi-step hiring process, and because the County's suggestion that countywide statistics be used does not amount to manipulation of the statistics. The County calls only for the effects of the policy to be measured according to the breadth of the policy's application. *Teal*'s disapproval of a "bottom line" defense has no application here.

We find *Watson*, *supra*, 487 U.S. 977 instructive. In *Watson*, the Supreme Court held that even subjective decision-making procedures could be subject to Title VII discrimination claims based on a disparate impact analysis. (*Id*. at pp. 988–989.) Thus, an African American woman who had been repeatedly passed over for promotions could maintain a Title VII action by proving the employer's subjective system of promoting employees based on supervisors' recommendations had a disparate impact on African Americans. (*Id*. at pp. 982, 991.) In that context, the Supreme Court discussed the pitfalls of proving discrimination on a disparate impact theory due to logical fallacies in the statistics plaintiffs are wont to present. "Without attempting to catalog all the weaknesses that may be found in such evidence, we may note that typical examples include small or incomplete data sets and inadequate statistical techniques." (*Id*. at pp. 996–997; see also *Stout v. Potter*, *supra*, 276 F.3d at p. 1123 [small sample size detracts from reliability of resulting statistics]; *Sengupta*, *supra*, 804 F.2d at pp. 1075–1076 [same]; *Alozie v. Ariz. Bd. of Regents* (D.Ariz., July 30, 2018, No. CV–16–03944–PHX–ROS) 2018 U.S. Dist. LEXIS 128716, at *6; *Ross v. O'Leary* (N.D.Cal. Oct. 31, 1996, No. C–95–3829 MHP) 1996 U.S. Dist. LEXIS 17605, *25–29.)

In addition to his misplaced reliance on *Teal*, Hughes puts forth cases indicating that "[t]he first step in a statistical analysis is to identify the base population for comparison. Generally, the appropriate population is the applicant pool or relevant labor market from which the positions at issue are filled. . . . [Citations.] In the context of promotions, the appropriate comparison is between the composition of candidates seeking promotion and the composition of those actually promoted." (*Stout v. Potter*, *supra*, 276 F.3d at p. 1123; accord, *Sanchez*, *supra*, 928 F.Supp. at p. 1500 [" 'Disparate

impact should always be measured against the actual pool of applicants or eligible employees unless there is a characteristic of the challenged selection device that makes use of the actual pool of applicants or eligible employees inappropriate.' "].) We find these cases unpersuasive because in neither case was there a dispute about a wider application of the policy in question. Moreover, the countywide applicability of the policy may be just the kind of " 'characteristic' " that would make a more limited analysis " 'inappropriate.' " (*Sanchez,* at p. 1500.)

Stout v. Potter was an unsuccessful challenge to the Postal Inspection Service's procedures for filling promotional vacancies in regional offices for Assistant Inspector in Charge. The Ninth Circuit rejected the plaintiffs' challenge in part based on the small sample size, which did not produce reliable statistics, and in part based on the disparity shown, which was not significant. (*Stout v. Potter*, *supra*, 276 F.3d at pp. 1122–1124.) We fail to see how the case helps Hughes. *Sanchez* involved a claim by Santa Ana police officers that a promotional examination to obtain the rank of Sergeant had a disparate impact on Hispanics. (*Sanchez*, at pp. 1499–1500.) Both parties agreed the relevant pool consisted of 144 Santa Ana police officers who took the promotional exam. (*Id*. at p. 1500.) The officers' challenge was unsuccessful at the final step of the analysis because the plaintiffs could not show an equally effective alternative that would have a less discriminatory impact. (*Id*. at p. 1512.)

By hand-picking a selection of 11 promotions within the County, and by analyzing the impact of the interview policy on those specific promotions (rather than all promotions filled using the interview policy), Hughes used statistics to create a skewed impression of the impact of the countywide policy on males, and instead showed nothing more than its impact on males seeking middle management positions within the SSB. His proof was therefore comparable to that deemed insufficient as a matter of law to support a prima facie case of discrimination in *Carter*, *supra*, 122 Cal.App.4th at page 1326. Hughes produced no evidence that men more generally were disadvantaged throughout the County workforce—or even throughout the DHHS—based on hiring or promotion decisions that included a personal interview. He claims he did enough to get

to a jury on disparate impact by putting forward a plausible statistical case limited to the employment unit that was "closest" to the actual employment decision that was made here. In our view, that is simply a post hoc rationale for why he should be allowed to "cherry-pick." The law requires more. He was obligated to present a statistical analysis of the entire employee population subject to the oral interview practice at issue, and if he wanted to argue the challenged practice was unique to the SSB, it was his burden at the prima facie stage to offer some proof of that.

B. Hughes's Cross-Appeal

Hughes filed a cross-appeal contending the trial court had erred in granting summary adjudication on the disparate treatment theory. The standard of review of a grant of summary adjudication is de novo. (*People ex rel. Becerra v. Huber* (2019) 32 Cal.App.5th 524, 532.) He argues he presented enough evidence of disparate treatment by establishing that 17 middle management positions had been filled in the SSB in the five years before trial, and all of the jobs went to women. As the County points out, however, that number was derived from an interrogatory response in which there was a typographical error; "17" was entered when "7" was the correct number. Suffice it to say, Hughes has not established that the trial court erred in concluding on summary adjudication that he could not establish discriminatory animus or pretext on the basis of the evidence available at the time of the motion.

III. DISPOSITION

The judgment is reversed and the cause is remanded with instructions to enter a new judgment in favor of the County of Humboldt. The order filed December 23, 2016, awarding attorney fees to Hughes is vacated. The County is entitled to costs on appeal.

_____
STREETER, ACTING P.J.

WE CONCUR:

_____
TUCHER, J.

_____
BROWN, J.

A148940, A150526